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No. 82 6913

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ANDRE' JONES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ILLINOIS

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No. _____

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QUESTIONS PRESENTED FOR REVIEW

1.

Does the sentencing scheme in Illinois provide sufficient guidance to trail Judges, prosecutors, defense attorneys, or the sentencing authority, where that authority is a jury, to comply with requirements of the Fourteenth, Eighth and Sixth Amendments?

2.

Is the Eight Amendment ban on unguided discretion in capital cases violated by a sentencing scheme that allows statutorily undefined aggravating factors to be considered as reasons for imposing death?

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2. This Court should grant Certiorari to resolve the question currently pending in Barclay v. Florida: Whether the Eighth Amendment ban on unguided discretion in Capital Cases is violated by a sentencing scheme that allows statutorily undefined aggravating factors to be considered as resons for imposing death.

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The Petitioner, Andre' Jones, prays that a Writ of Certiorari issue to review the judgment and opinoin of the Supreme Court of Illinois holding that a sentence of death was properly imposed on two of the three murders of which he was convicted.

I

OPINION BELOW

The opinion of the Supreme Court of Illinois was filed on December 17, 1982, as No. 53414. A copy of the opinion is attached hereto as Appendix A.

II

JURISDICTION

The judgment by the Supreme Court of Illinois was entered on December 17, 1982. Petitions for Rehearing were filed by both Petitioner and the People of the State of Illinois and were denied by order of court on April 8, 1983, a memordandum of which is attached hereto as Appendix B. This petition is being filed within sixty (60) days of the Illinois Supreme Court's denial of rehearing. The juris-

diction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

III
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall...deprive any person of life, liberty, or property, whithout due process of law...

The Sixth Amendment to the Constiution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; and to have the Assistance of Counsel for his defense.

The provision for convening a capital sentencing hearing follows and Illinois' defendant's conviction for murder is found in Ill. Rev. Stat. 1977, Ch. 38, Sec. 9-1(d):

> (d) Separate sentencing hearing.
>
> Where requested by the State, the Court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in Subsection (b) and to consider any aggravating or mitigating factors as indicated in Subsection (c).

The provision for jury deliberations and instruction at a death sentencing proceeding is found in Ill. Rev. Stat. 1977, Sec 9-1(g):

(g) Procedure-Jury. If at the separate sentencing proceeding the jury finds that none of the factors set forth in Subsection (b) exists, the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections. If there is an unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death.

Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.

IV
STATEMENT OF THE CASE

Andre' Jones was indicted along with Freddie Tiller, Jr., for the murders of Samuel Nersesian, Debra Brown and Richard M. Stolty. Subsequently, Andre' Jones was appointed seperate council and entered a plea of guilty to all three murder charges on August 23, 1979 (R.p. 058-085).

A sentencing hearing was held before a jury. After finding pursuant to Ill. Rev. Stat. 1979, Ch. 38, para. 9-1(b) that the defendant had been convicted of murdering two or more individuals, the cause proceeded to the aggravation and mitigatin phase. The jury was not required to under the Illinois Statute nor did they determine which of the murders or all, defendant was convicted of.

On April 15, 1980, Defendant's Guilty Plea was read to the jury in its entirety including the trial judge's warning to the defendant that he would sentence him to death, if statutory factors in aggravation were proven (R.p. 311, 313-314) and referring to the senseless killings and his duty to neglected society.

Pursuant to the Illinois statutory section Ch. 38, Sec. 9-1(e) "Information" relevant to additional aggravating fators could be presented "regardless of its admissability under the rules governing the admission of evidence at criminal trials." These factors are not statutorily defined or limited.

Evaluations of defendant were read from reports of persons neither present nor known to the witness reading them (R. p. 360-361, p. 365, 366). Evidence including a confession obtained subsequent to defendant's guilty plea, of other crimes with which defendant had neither been charged nor convicted was introduced (R. p. 373-379), along with photographs depicting bodies and parts of bodies from these other crimes.

In line with the trial judges, the prosecutors, and the

defense attorneys interpretation of the "information" that could be received, the hearsay description of a fireman's reaction to the discovery that he was trying to give artificial respiration to the body of a decapatated body of a victim from a non-charged murder was admitted (R. p. 393-394).

At the close of the State's case, the defendant's attorney placed on no evidence in mitigation.

The jury was instructed, including the standard instruction in Illinois that they must return a unanimous verdict (R. p. 0131, 441) although the only unanimous verdict form is the one for death, and the jury returned a verdict for death.

The issues presented here for review were first raised on the direct appeal to the Supreme Court of the State of Illinois and on Petition for rehearing before that Court. The Supreme Court of Illinois affirmed the death sentence as to two murders and reversed and remanded for new sentencing as to one. Petition for rehearing was denied April 8, 1983.

V
REASONS FOR GRANTING CERTIORARI

1.

This Court should grant Certiorari because the sentencing scheme in Illinois is insufficient to guide trial judges, prosecutors, defense attorneys, or the sentencing authority, where that authority is a jury, to channel and guide discretion as required by this Court in Gregg v. Georgia, or to comply with required safeguards of the Sixth and Fourteenth Amendments.

Andre' Jones was sentenced to death by a jury instructed under Section 9-1(g) Ch. 38, Ill. Rev. Stat., that it must impose death unless it ..."unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence." (Emphasis added).

It was submitted to the Supreme Court of Illinois that this guide to the jury sentencing authority must impose the capricious and arbitrary sentencing it seeks to avoid. The dictionary definition of preclude, "to make impossible by necessary consequence" or "to prevent the presence, existence or occurrence of: make impossible," would make a nulity of legislative intent as pronounced by the Supreme Court of Illinois in People vs. Gleckler, 82 Ill. 2d, 134 411 NE 2d 849 (1980), while to leave the term preclude undefined would leave a jury unguided as to what a defendant must do to avoid imposition of the death penalty.

The Supreme Court of Illinois rejected this argument by in effect stating that it was obvious a balancing procedure was required and not the literal definition (People v. Andre' Jones, Docket No. 53414, entered of Record 17, December 1982, pages 3-4).

This ignores the trial judge's own interpretation during the trial and announced to the jury embodying the dictionary definition.

If the trial judge does not have clear guidance here, it is submitted that either the discretion to be exercised as required by Gregg v. Georgia (1976) 428 U.S. 153, 198, 49

L Ed 2d 859, 888, is not there at all or is not controlled by ..."objective standards", where the jury must seek its own individual interpretation.

Section 9-1(e) Ch. 38, Ill. Rev. Stat., also sets no standard for guidance for the jury or the trial judge and attorneys. In allowing any ..."relevant information" it gives no guidance on what the jury must base it decision nor as to proper conduct for the court, or attorneys. Gregg clearly does not require that only evidence admissible at a trial be received, but does invision that juries be carefully instructed as to the law Gregg v. Georgia, (1976) 428 U.S. 153, 193. The difference between "information" in the Illinois and "evidence" in the Georgia Statute considered in Gregg is not merely technical.

Where the sentencing body is a jury unable, as a judge theoretically would be, to consider information which rose to the level of evidence and to ignore information suspect or non-probative of the issues on evidentory grounds, the Illinois statutes allows widely divergent sentencing hearings without any law for the jury to be instructed on in terms of what information to consider.

The Illinois Supreme Court in rejecting defendant's argument here cites People v. Adkins, (1968) 41 Ill. 2d 297, for the proposition that a judge (emphasis added) should have wide discretion in receiving information as long as he exercises care to insure its accuracy.

In asserting that it is no different where the sentencing body is a jury (and where death is a possible sentence) it is respectfully submitted that this begs the question and it is precisely when the sentencing authority is a jury that receiving "Relevant information" allows for the capricous diversity in sentencing denounced by this court.

The confusion of the judge, and both attorneys, as to what if any limits were imposed on them by the Illinois Statute (R. p. 5-16) does not support the Supreme Court of Illinois' conclusion that the fact that information presented must be relevant (People v. Andre' Jones, p. 5-6) imposes sufficient restraints on and guidelines for lawyer conduct.

In rejecting the contention that insufficient guidance for the conduct of defendant counsel denied defendant Sixth Amendment protection by turning the hearing into a ruleless battle, the court did not address the issue of defense attorney's competence raised by inference originally and specifically on petition for rehearing.

If a test for attorney competence is implicit and rules for conduct or meaningful objection are available within the Illinois sentencing scheme, then as the Illinois Supreme Court seems to suggest in referring to the defense attorney's failure to object (People v. Jones, p. 12, 13, 14) fails to constitute such competence. But neither by statute or by rule of court has it been made clear what constitutes competence at such a hearing where the statute

allows for objection only on relevance.

2

This Court should grant Certiorari to Resolve the question currently pending in Barclay v. Florida: Whether the Eighth Amendment ban on unguided discretion in capital cases is violated by a sentencing scheme that allows statutorily undefined aggravating factors to be considered as reasons for imposing death.

Under Ill. Rev. Stat., Ch. 38, Sec. 9-1 (c) and (e) the state may present "information relevant to any additional aggravating factors..." It thus follows a scheme of allowing death to be imposed based on non-statutorily defined aggravation, i.e., whatever the prosecutor chooses to submit and whatever the trial judge chooses to allow

Extensive information presented by the State's attorney in the instant case, and suggested as inflamatory, or objectionable as unreliable hearsay or evidence of uncharged and unproven other crimes by defendant before the Supreme Court of Illinois was not statutorily specificed but falls under this section.

As in this case, and by the statutes vague nature, the Eighth Amendments' prohibition on unguided sentencing discretion is violated.

The Fifth Circuit has held that such unstatutory factors cannot be considered in assessing death (Henry v. Wainwright, 661 F 2d 56, 5th Circuit 1981) vacated on other grounds, ____ U.S. ____, 73 L Ed 2d 1326 (1982), aff'd 686 F 2d 311 (11th CIr. Unit-B, 1982) as unconstitutionally

broadening sentencing discretion as prohibited in Furman v. Georgia, 408 U.S. 238, 33 L. Ed 2d 346 (1972).

The issue of whether a death sentence can be premised on consideration of non-statutory aggravating factors is currently before this Court in Barclay v. Florida (No. 81-6908).

The case of Andre' Jones is particularly suitable for consideration of this issue because of the extreme stance of the State's Attorney in introducing "information" to the jury, the Trial Judge's belief that he could not limit this information, and the defense attorney's docile and resigned approach to resistence.

The Illinois Supreme Court was asked to consider this issue from the standpoint of Henry v. Wainwright and Barclay v. Florida, on Petition for Rehearing, but declined to consider the issue.

VI

CONCLUSION

For the foregoing reasons, Andre' Jones, Petitioner, respectfully requests tht a Writ of Certiorari be issued to the Supreme Court of Illinois.

Respectfully submitted,

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Attorneys for Petitioner

OPINION

SUPREME COURT OF ILLINOIS

United States of America

State of Illinois, Supreme Court } ss.

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eighth *day of* November *in the year of our Lord, one thousand nine hundred and* eighty-two *, within and for the State of Illinois.*

PRESENT: HOWARD C. RYAN, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD — JUSTICE DANIEL P. WARD

JUSTICE JOSEPH H. GOLDENHERSH — JUSTICE WILLIAM G. CLARK

JUSTICE THOMAS J. MORAN — JUSTICE SEYMOUR SIMON

TYRONE C. FAHNER, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: H. [redacted], CLERK
JULEANN HORNYAK

Be It Remembered, *that afterwards, to-wit, on the* 17th *day of* December *, 19 82 the opinion of the Court was filed in said cause and entered of record in the words and figures following, to-wit:*

People State of Illinois,

Appellee

No. 53414 vs.

Andre Jones,

Appellant

} Appeal from Circuit Court St. Clair County

EXHIBIT A

Docket No. 53414—Agenda 2—September 1981.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. ANDRE JONES, Appellant.

JUSTICE GOLDENHERSH delivered the opinion of the court:

Defendant, Andre Jones, was indicted with a codefendant, Freddie C. Tiller, Jr., in the circuit court of St. Clair County for three counts of murder (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(a)(1)), three counts of armed violence (Ill. Rev. Stat. 1979, ch. 38, par. 33A—2) and three counts of armed robbery (Ill. Rev. Stat. 1979, ch. 38, par. 18—2(a)). The St. Clair County public defender was appointed to represent him, but upon allowance of the public defender's motion to withdraw other counsel was appointed. Defendant entered a plea of not guilty which was subsequently withdrawn, and he pleaded guilty to the three murder charges. Pursuant to section 9—1(d) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(d)) the People requested a separate sentencing hearing and defendant elected to have a jury impaneled for those proceedings. The jury found, unanimously, that one or more of the factors set forth in the statute existed and, following the consideration of aggravating and mitigating factors, found unanimously that there were no mitigating factors sufficient to preclude a sentence of death. (See Ill. Rev. Stat. 1979, ch. 38, par. 9—1(g).) The jury returned a verdict directing the court to sentence defendant to death, and defendant was sentenced to death for each of the three murders. The sentences wre stayed (73 Ill. 2d R. 609(a)) pending direct appeal to this court (Ill. Const. 1970, art. VI, sec. 4(b); 73 Ill. 2d R. 603).

The testimony and defendant's confession showed that on the morning of April 30, 1979, defendant left his apartment carrying a .22-caliber Rohm revolver. Defendant and his girlfriend walked until they met with Tiller. The three of them walked until they saw an elderly man, Richard Stoltz, standing in the back of a pickup truck, stacking bricks. Tiller, stating that he was going to rob Stoltz, asked defendant for his gun. Defendant gave his gun to Tiller, who told Stoltz, "This is a stickup." Stoltz raised his hands, and Tiller fired the gun, striking Stoltz in the left eye. Tiller then took a wallet, keys and a wrist watch from Stoltz' body. Defendant and Tiller rejoined the girlfriend,

who had crossed the street. They continued their walk until they arrived at the Illinois Cleaners, located across the street from Jones' apartment. The girlfriend left after being told by defendant to go home. Defendant then suggested that he and Tiller rob the cleaners, and Tiller agreed. Defendant and Tiller entered the store and, once inside, defendant shot the proprietor, Samuel Nersesian; in the head. He fell to the floor, and defendant shot him again. Defendant then opened the cash register and took an undetermined amount of money. As they were about to leave, a mail carrier, Debra Brown, who had arrived in a mail truck, entered the store. Defendant hid behind the door, and when Miss Brown entered, defendant grabbed her around the neck from behind. He pushed her back through a kitchen located at the rear of the business and into a storage room. There defendant knocked her down, shot her in the chest, and then shot her in the mouth. Defendant and Tiller then left the store. Tiller left the scene in the mail truck, and defendant walked across the street to his apartment. All three of the shooting victims died.

Following the introduction of the foregoing evidence and the giving of instructions to the jury, the jury returned a verdict finding that defendant had been convicted of murdering two or more individuals and that at the time of the offenses he had attained the age of 18 or more. (See Ill. Rev. Stat. 1979, ch. 38, par. 9—1(b)(3).) The cause then proceeded to the aggravation and mitigation phase.

The evidence showed that defendant had a significant history of criminal activity. Included therein was defendant's confession to two murders committed prior to the offenses for which he was being sentenced. No information in mitigation was offered by either defendant or the People. After deliberating for approximately 20 minutes, the jury returned a verdict unanimously finding that there were no sufficiently mitigating factors present to preclude imposition of the death sentence. Pursuant to the verdict and statute (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(g)), the court sentenced defendant to death for the murders of Richard Stoltz, Samuel Nersesian and Debra Brown.

We consider first defendant's contention that the death penalty provisions of the statute are unconstitutional for the reason that they do not contain sufficient guidelines to enable a jury to properly determine when the death penalty may be imposed. Defendant cites first the language of

section 9—1(g) which in pertinent part provides:

> "If there is a unanimous finding by the jury that one or more of the factors set forth in Subsection (b) exist, the jury shall consider aggravating and mitigating factors as instructed by the court and shall determine whether the sentence of death shall be imposed. If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(g).)

Citing definitions of "preclude" (Webster's Seventh New Collegiate Dictionary (1963); Random House Dictionary of the English Language (1973)) defendant argues that the statutory provision which requires the jury to impose death if it "unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence *** must necessarily impose the capricious and arbitrary sentencing it seeks to avoid." He argues further that under a literal interpretation of the statute a jury "would be required to impose death unless defendant presented a complete defense to the aggravating factors qualifying him for the death penalty." The alternative to the literal interpretation, he contends, is that there are no standards or guidelines, and the weighing procedure mandated by our earlier cases is nullified.

We do not agree. In *People v. Brownell* (1980), 79 Ill. 2d 508, the defendant contended that the trier of fact was not given guidance as to the weight to be given the aggravating versus the mitigating factors and that section 9—1(g) was therefore unconstitutionally vague. In rejecting this contention the court said:

> "Without doubt, a balancing process is required; while the precise weight to be given each aggravating and mitigating factor is not made a matter of numerical calculation, that is not a constitutional infirmity. Rather, since the sentencing authority is given specific evidence to weigh, based upon the particularized circumstances of the case, any '"discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application."' *Gregg v. Georgia* (1976), 428 U.S. 153, 198, 49 L. Ed. 2d 859, 883, 96 S. Ct. 2909, 2936, quoting *Coley v. State* (1974), 231 Ga. 829, 834, 204 S.E.2d 612, 615. As stated in *Proffitt*: 'While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* [*Furman v. Georgia* (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726] are satisfied when the sentencing authority's discretion is guided and

channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.' *Proffitt v. Florida* (1976), 428 U.S. 242, 258, 49 L. Ed. 2d 913, 926, 96 S. Ct. 2960, 2969." (79 Ill. 2d 508, 534.)

It is clear from the foregoing statement that preclusion of the death penalty does not require, as defendant contends, "a complete defense to the aggravating factors qualifying him for the death penalty." Furthermore, we find that section 9—1(g), as construed, fulfills the constitutional requirement that the sentencing authority be given specific factors to examine in determining whether to impose the death penalty.

We consider next defendant's contention that section 9—1(e) is invalid for failing to set any standard save relevance for the admission of information in the second phase of the sentencing hearing. Section 9—1(e) provides:

"(e) Evidence and Argument. During the proceeding any information relevant to any of the factors set forth in Subsection (b) may be presented by either the State or the defendant under the rules governing the admission of evidence at criminal trials. Any information relevant to any additional aggravating factors or any mitigating factors indicated in Subsection (c) may be presented by the State or defendant regardless of its admissibility under the rules governing the admission of evidence at criminal trials. The State and the defendant shall be given fair opportunity to rebut any information received at the hearing." (Ill. Rev. Stat. 1979, ch. 38, par. 9—1(e).)

It is argued that since the People are permitted to present any "information" relevant to other aggravating and mitigating factors regardless of its admissibility under the rules of evidence, the only restraint placed upon the State's Attorney's discretion is his personal sense of propriety. It is also argued that this provision penalizes a defendant for electing to be sentenced by a jury rather than a judge, who, when considering the information presented, would be possessed of knowledge of the rules of evidence. Finally, specific alleged examples are cited where it is claimed that defendant was prejudiced by reason of the jury's consideratioin of certain information.

The purpose of the aggravation and mitigation phase of the sentencing hearing is to insure that discretion in the area of sentencing be exercised in an informed manner. In *Woodson v. North Carolina* (1976), 428 U.S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978, the Supreme Court said:

"This Court has previously recognized that '[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.' *Pennsylvania ex rel. Sullivan v. Ashe* [(1937), 302 U.S. 51, 55, 82 L. Ed. 43, 46, 58 S. Ct. 59, 61]. Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. See *Williams v. New York* [(1949), 337 U.S. 241, 247-49, 93 L. Ed. 1337, 1342-43, 69 S. Ct. 1079, 1083-84]; *Furman v. Georgia* [(1972), 408 U.S. 238, 402-03, 33 L. Ed. 2d 346, 443-44, 92 S. Ct. 2726, 2810-11] (Burger, C.J., dissenting). While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles* [(1958), 356 U.S. 86, 100, 2 L. Ed. 2d 630, 642, 78 S. Ct. 590, 597] (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. 280, 304, 49 L. Ed. 2d 944, 961, 96 S. Ct. 2978, 2991.

In *People v. La Pointe* (1981), 88 Ill. 2d 482, 496, we quoted with approval from *People v. Adkins* (1968), 41 Ill. 2d 297:

" '[A] sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.' (41 Ill. 2d 297, 300.) While 'the judge *** is not limited to considering only information which would be admissible under the adversary circumstances of a trial,' he must 'exercise care to insure the accuracy of information considered.' 41 Ill. 2d 297, 300."

While in *La Pointe* and the authorities therein discussed the court was the "sentencing body," there is no valid reason to apply a different rule where the jury makes the determination. The court and the People are under a duty to avoid the introduction of evidence, the prejudicial effect of which outweighs its relevance. (See *People v. Riley* (1941), 376 Ill. 364, 369.) Section 9—1(e) also provides that both the People and the defendant "shall be given fair opportunity to rebut any information received at the hearing." The requirement that the information be relevant, construed in

the light of these basic rules, imposes sufficient restraints on the exercise of the prosecutor's discretion and serves to minimize the risk of arbitrary and capricious action. Our holding that in imposing sentence a jury is entitled to the same latitude in considering information relevant to sentencing as is the court is in accord with those of most of the jurisdictions which have considered the question. See cases collected at Annot., 96 A.L.R.2d secs. 13 through 16, at 768, 811 (1964); 96 A.L.R.2d secs. 13 through 16, at 333, 339 (Later Case Serv. 1976); 96 A.L.R.2d Supp. secs. 13 through 16, at 153, 169 (Later Case Serv. 1981).

In considering many of defendant's contentions we note that it is well settled that a defendant in a capital case has no due process right to cross-examine all out-of-court sources of information relied upon in sentencing. (*Williams v. New York* (1949), 337 U.S. 241, 250-51, 93 L. Ed. 1337, 1343-44, 69 S. Ct. 1079, 1085.) Defendant contends that the revolver used in the April 30 shootings was improperly offered for the jury's consideration because its admission was based on hearsay testimony. During the aggravation and mitigation phase of the hearing an East St. Louis detective testified on direct examination that a certain .22-caliber Rohm revolver was the weapon used in the April 30 shootings. The detective testified that he obtained this information from a sergeant on the East St. Louis police department who had received the information concerning the weapon from defendant and had then obtained the weapon from the home of the defendant's grandmother. The detective also testified that the weapon was tested for ballistics with slugs removed from the bodies of the victims. At this point defense counsel objected, and his objection was overruled. Defense counsel then asked that the record show continuing objection, and the court so ordered. The detective then testified that the ballistics tests from the crime laboratory were "positive," indicating that the revolver was the weapon used in the April 30 shootings. In view of the fact that defendant confessed to using a .22-caliber Rohm revolver in the shootings, we hold that the weapon was not improperly introduced into evidence.

Next, we consider whether information concerning defendant's past misconduct contained in a presentence investigation report was properly introduced at the sentencing hearing. A St. Clair County probation department investigator who had prepared a presentence report of defendant's character and background testified that accord-

ing to records of the Juvenile Department of Corrections defendant had been involved in theft while incarcerated in a juvenile detention institution. The investigator further testified that according to information obtained from the parole board defendant had been involved in 22 disciplinary violations while incarcerated in the Menard Correctional Center. The investigator also quoted from a psychiatric report contained in an evaluation of defendant given to the parole board. The report stated that defendant "has aggressive tendencies, low frustration tolerance, high impulsivity, very poor delaying mechanism, and total inability to channel his aggression into constructive aspects of life."

In cross-examining the investigator defense counsel elicited other general information obtained from records concerning defendant. Apparently preparing the groundwork for his closing argument, defense counsel reviewed some of the information the parole board had before it when it released defendant. In closing argument defense counsel asked the jury to channel their desire to place blame on the parole board that released the defendant into a society where he did not belong. Had defense counsel's strategy succeeded it is doubtful that it would now be argued that it was unfair to permit proof by means of hearsay testimony of the information contained in the reports. In addition, we note that defense counsel asked the investigator whether it was not true that after talking with defendant and completing his investigations that it was found that much of the information provided by defendant was true, and the investigator agreed. Past criminal involvements disclosed by presentence investigation reports have been held a proper matter for consideration in sentencing (see *Williams v. New York* (1949), 337 U.S. 241, 250-51, 93 L. Ed. 1337, 1343-44, 69 S. Ct. 1079, 1085; see cases collected at Annot., 96 A.L.R.2d sec. 10(h), at 768, 804 (1964); 96 A.L.R.2d sec. 10(h), at 333, 339 (Later Case Serv. 1976); 96 A.L.R.2d sec. 10(h), at 153, 167 (Later Case Serv. 1981), and we hold that the inquiry here into defendant's background was within reasonable bounds.

We next consider whether the information contained in the defendant's confession to the other murders, committed prior to the April 30 murders, was improperly admitted at the aggravation and mitigation phase of the sentencing hearing. The record shows that on August 30, 1979, a detective from the St. Clair County sheriff's office interviewed Tiller at the St. Clair County jail to determine

whether Tiller had any knowledge of other unsolved crimes in the St. Clair County area. Tiller told the detective that defendant might have been involved in some of those crimes. The detective then interviewed defendant at the St. Clair County jail. After being advised of his constitutional rights, defendant expressed general knowledge of other homicides in the St. Clair County area without providing any specific information. Two days later, on September 1, 1979, defendant asked to see the detective. When the detective met defendant at the jail he was given a six-page statement, handwritten by defendant, confessing to the homicides of Michael and Dora Wallace. Having no knowledge of these homicides, the detective did not question defendant about his confession at that time. After having obtained information regarding the homicides the detective again met with defendant at the St. Clair County jail. As a result of this interview, information was gathered that corroborated the confession. In addition, defendant also arranged to have an unidentified female deliver to the detective the butcher knife used in the killings. The knife was subsequently identified as a butcher knife belonging to one of the victims.

The first question presented is whether this information was obtained in violation of the defendant's right to counsel. There is no question that under the sixth and fourteenth amendments a defendant is entitled to advice of counsel at the sentencing stage of the criminal process unless he has knowingly and intelligently waived this right. (*Mempa v. Rhay* (1967), 389 U.S. 128, 19 L. Ed. 2d 336, 88 S. Ct. 254; *Carter v. Illinois* (1946), 329 U.S. 173, 91 L. Ed. 172, 67 S. Ct. 216; *Johnson v. Zerbst* (1938), 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019.) The record here reflects that the detective from the St. Clair County sheriff's office interviewed defendant at the St. Clair County jail where defendant was incarcerated after being charged with the April 30 murders. The purpose of this initial interview was to obtain any information defendant might have about other homicides in the East St. Louis area. Although counsel had been appointed for defendant, this initial interview was conducted, and subsequently a confession was obtained, without the presence of or notice to defendant's attorney. The record shows, however, that at the time of the initial interview defendant was advised of his constitutional right to counsel and that he signed a waiver form. At this first interview he gave no specific information but told the

detective that the reason he had been caught for the crimes he had committed in the past was that he had been identified by the victim or witness. He stated that the last time he was in the penitentiary he had made up his mind that he would never be identified by a witness or victim again because he would destroy them. It was defendant who initiated the subsequent contact with the detective, at which time defendant gave the officer his six-page handwritten confession of the Wallace killings. The record does not show how many more times the detective talked to defendant or whether defendant was again advised of his rights at the subsequent interviews. At those times he corroborated his confession by informing the detective that there had been a small brown dog at the Wallace home, where the killings occurred, by describing the knives and small caliber pistol that had been at the home, and by arranging to have the knife he said he used in the killings, later identified as the victim's knife, delivered to the county jail. Nevertheless, we find no violation of defendant's constitutional right to counsel. It is clear that defendant was no stranger to criminal proceedings and there is no claim that defendant was not aware of his right to confer with his attorney prior to giving any information to the detective. The voluntariness of defendant's participation in the interviews conducted at the St. Clair County jail is not contested. Defendant apparently voluntarily and knowingly waived his right to have counsel present at these interviews, and therefore the information obtained pursuant to these interviews cannot be suppressed on the ground that defendant's sixth amendment right to counsel was violated.

We next consider whether the offenses shown by defendant's confession were properly admitted into evidence. In *United States v. Dalhover* (7th Cir. 1938), 96 F.2 355, the court considered whether it was permissible for jury to consider a defendant's statement to a governmer agent, made while under arrest, in which the defendant participation in approximately 150 robberies was admitte In rejecting the contentions that it would be unfair to allo in this information of other offenses and that a jury lacke the discrimination capable of a judge in considering the i formation, the court said:

> "Of course it is illegal and manifestly unfair to requi one charged with a specific crime to prepare a defen against other unrelated crimes that the state may tempt to prove against him, but which are not charged

> the indictment. *** However, where, as here, the evidence of other crimes comes only from the lips of the accused in his admissions following his arrest, which he has never denied; and where he has pleaded guilty, so that there is no question as to finding him guilty of the crime charged by the proof of other unrelated crimes, there is no need for the application of the rule. Moreover, it seems to be generally the rule that the court in imposing sentence may take into consideration other offenses committed by the defendant, in the absence of a statute forbidding it. See annotation in 86 A.L.R. 832. There seems to be no good reason for denying the jury the same latitude." (*United States v. Dalhover* (7th Cir. 1938), 96 F.2d 355, 360.)

(See cases collected at Annot., 96 A.L.R.2d sec. 13, at 768, 811-12 (1964); 96 A.L.R.2d sec. 13, at 333, 339-40 (Later Case Serv. 1976); 96 A.L R.2d sec. 13, at 153, 169-70 (Later Case Serv. 1981).) In view of defendant's conviction on pleas of guilty, his voluntary confession, and the substantial corroboration present, we find no reason to conclude that the defendant's confession to the Wallace murders was improperly presented at the sentencing hearing.

We consider next the specific allegations of prosecutorial abuse as to the information presented. The record shows that Dora and Michael Wallace were found dead in their burning home in East St. Louis on November 15, 1978. It was established that Mrs. Wallace suffered deep lacerations to the throat area and bludgeoning of the face and head area, as well as deep gashes in the hands and arms. Mr. Wallace had been decapitated. Defendant's confession, which was read to the jury, contained the details of defendant's commission of the acts that resulted in the deaths of the Wallaces and the burning of their home. Defendant also confessed to taking Mr. Wallace's head with him and later discarding it in the area where the skull was subsequently found. A detective from the East St. Louis police department was asked on direct examination to relate to the jurors the circumstances as he confronted them when he arrived at the scene of the Wallace case on November 15, 1978. The following colloquy then took place:

> "A. Well, the first thing I saw was a fireman running down the street, screaming. And it was about two or three firemen standing on the porch. And I approached the porch, and there was blood running down off the front porch, because it was raining, and I saw a body of a man who was—who had been beheaded, and was burning on one side. He had on some shorts, undershorts, and a white T-shirt that was soaked in blood.

Q. He not fully dressed when you arrived there.
A. No.
Q. Did anyone indicate to you or did you learn whether or not that was the way he was when he was first seen by the fireman?
A. Well, the fireman explained to me they had entered the building or the smoke filled room, and had stumbled upon this body. And they had pulled it out onto the porch in an effort to give the person artificial respiration, and the fireman who was running down the street was the guy who was going to give artificial respiration, and there wasn't a head.
Q. So it was originally inside the house, the body?
A. Yes."

The description of the fireman's reaction was elicited in response to general questions posed by the State's Attorney on direct examination. The gruesome description contained in the detective's testimony was unnecessary to describing the circumstances of the scene, but we are not prepared to conclude that it was so totally unrelated to sentencing and prejudicially inflammatory as to deny the defendant a fair hearing. While we acknowledge that the description of the fireman's reaction was bound to cause emotional response, we note that the jurors heard defendant's own grim and detailed description of the Wallace killings and the burning of their home. The jurors received this information after hearing defendant's confession to the murders of three people. In view of the aggravating factors present, and the complete absence of any mitigating circumstances, we cannot conclude that the jury was so inflamed by receiving the challenged information that it was unable to base its decision that there were no mitigating factors sufficient to preclude the death penalty on information properly presented.

At the first phase of the sentencing hearing the widow of Richard Stoltz was asked to identify a photograph of her husband, taken after he had been shot. At the conclusion of the second phase this photograph, along with several other photos depicting the victims of both the April 30 and the Wallace killings and the burned Wallace home, was presented to the jury as information relevant to an aggravating factor, specifically, to show the type of brutality in which defendant had engaged. It is unlikely that at this point in the proceedings the photographs would have created more revulsion in the jurors toward defendant than was already present. Since the jury deliberation took approximately 20 minutes it is clear that there was little diffi-

guilty in deciding that the death penalty was warranted, and we do not believe that the admission of the photographs at this late date in the proceedings deprived defendant of the right to be sentenced by a rational tribunal.

We consider next whether the court's conduct during the sentencing proceedings violated defendant's fundamental right to a fair hearing as guaranteed by the due process clause of the fourteenth amendment. Foremost among the errors alleged is the claim that the court erred in allowing defendant's plea of guilty to be read to the jury. It is argued that the reading of the transcript denied defendant a fair trial because the court's comments contained therein implied the court's predisposition as to the sentence to be imposed, which in turn improperly influenced the jury in arriving at the verdict. The transcript of the plea proceeding was read to the jury during the first phase of the bifurcated hearing to establish defendant's age and the presence of a statutory factor in aggravation. Included in the reading were the court's admonishments to defendant that if statutory factors in aggravation were proved the court would not hesitate to sentence defendant to death.

At the time the People made a motion to introduce the transcript of the plea proceeding into evidence the court inquired of defense counsel, who expressly stated that there was no objection. It is urged that the failure to object to the reading at the sentencing hearing precludes our consideration of this claim.

In *People v. Carlson* (1980), 79 Ill. 2d 564, this court considered whether alleged errors not objected to by defendant at trial were waived. After examining the waiver doctrine, and our Rule 615(a) (73 Ill. 2d R. 615(a)), which embodies the exception to the waiver rule, the court adhered to the rule that even in the absence of objection at trial, a court of review will grant relief if the trial error is so prejudicial that real justice has been denied or the verdict of the jury resulted from such error. (See *People v. Carlson* (1980), 79 Ill. 2d 564, 576-77; *People v. Wright* (1974), 56 Ill. 2d 523, 533-34; *People v. Manzella* (1973), 56 Ill. 2d 187, 200.) The same rule applies whether the alleged errors occurred at trial or at sentencing. We will therefore examine the content of the transcript, as well as the other alleged sentencing errors, to determine whether any error deprived defendant of the fundamental right to a fair hearing.

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In addressing defendant the court remarked, "if certain factors are present, you could be sentenced to death, ***. Did he [defendant's defense attorney] tell you that if the factors which are necessary and which are present and which I will read to you are present, I wouldn't hesitate to sentence you to death." He later went on to say, "I have to take into consideration our society, which has been neglected far too long by crimes of violence. And from what the facts appear to be here, these are senseless killings."

A judicial opinion should not influence the jury, either directly or indirectly. (*People v. Finn* (1959), 17 Ill. 2d 614, 617; *People v. Coli* (1954), 2 Ill. 2d 186, 189; *Marzen v. People* (1898), 173 Ill. 43, 57-59.) We note that at the conclusion of the first phase of sentencing the court instructed the jury: "Neither by these instructions nor by any ruling or remark which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be." Furthermore, when the court's remarks are read in the context of the entire plea proceeding, it becomes apparent that the court attempted to firmly impress upon defendant the grim fact that if he pleaded guilty to three murders, and if he chose to be sentenced by the court, and if the People proved beyond a reasonable doubt any statutory factor in aggravation, the court would not hesitate to sentence defendant to death. The court was required to inform defendant of such matters at the time of accepting his plea, and to determine that defendant understood this information. (73 Ill. 2d R. 402.) The veniremen were addressed, without challenge, along the same lines, in that each was questioned as to any hesitancy to abide by the death penalty statute, even if it meant the imposition of the death penalty if the aggravating factors were proved. We are not persuaded that defendant was prejudiced as the result of the transcript having been read to the jury at the sentencing hearing.

It is alleged that certain comments made by the court to the veniremen during *voir dire* examination were misstatements of law and that the court's conduct expressed a sarcastic attitude toward defendant. The record shows that, prior to questioning each panel of veniremen, the court attempted to familiarize the panel with the purpose and order of the bifurcated sentencing procedure. It is argued that the court's introductory remarks concerning the aggravation and mitigation phase of the hearing are considered objectionable for the same reason that section 9—

1(g) is challenged on appeal; that the court implied that defendant must disprove the aggravating factors to escape the death penalty. We have examined the challenged passages and conclude that the court sufficiently informed the veniremen of the procedure under section 9—1(g). We find no merit in the contention that the court misstated the law in this regard.

It is further urged that another of the court's comments during *voir dire* compounded the prejudicial effect of an inappropriate jury instruction given at the conclusion of the hearing. A standard and unobjected-to general instruction included the sentence, "Your agreement upon a verdict must be unanimous." At one point during *voir dire,* the court advised a prospective juror, "you go out and determine whether or not this evidence has taken away the factors, mitigated the factors so that you might say no, we don't want to vote for the death penalty. Now, that has to be a unanimous verdict in this case." It is urged that the instruction and comment created a presumption in favor of the imposition of the death sentence. The record shows, however, that the jury was instructed that it would receive, and that the jury did receive, two forms of verdict. One form stated that the jury was unable to unanimously conclude that the death penalty was warranted, and another stated that the jury unanimously concluded that there were no sufficiently mitigating factors to preclude the imposition of the death sentence. The jury was instructed that it was entitled to determine which verdict form was warranted. In view of the comments made by counsel during the proceedings, the proper instructions given by the court, and the verdict forms, it is clear that any confusion caused by the inappropriate instruction and the ambiguous, isolated comment by the court was inconsequential. There is no question whether the jurors were made aware of the right to arrive at a verdict of their choice, and the record presents no reason to conclude that defendant was prejudiced by court pronouncements of law.

It is also claimed that during *voir dire* the court improperly expressed personal knowledge of an essential element not yet proved and improperly implied that the determination of this critical question was nothing more than a formality. A prospective juror asked the court "why don't you know if he [the defendant] is 18?" The court responded that "I do know whether he is 18 or not, but the legislature said we have to do it all over again. *** This is some-

thing that was given to us by the legislature, and I have to proceed according to law. So that—well, that is what the defendant wants, and that is what he gets." Although no objection was made at the time the court's comment was made, the venireman was later challenged for cause by defense counsel. The record shows that the age element was satisfied through defendant's own admission of his age. The court's comment could not possibly have affected the finding of age, and we are not persuaded that this statement communicated a negative attitude toward defendant. In another comment made by the court at the conclusion of the first stage of the bifurcated hearing the court directed court personnel to "Get instructions for this stage of the game." This comment, like the reference to the legislative decision above, may be criticized as showing discontent with legislative imposition of time-consuming procedures, but it does not indicate an opinion as to what penalty should be imposed against defendant.

Finally, we consider whether, as contended by defendant, the closing argument of the State's Attorney denied defendant his right to a fair sentencing hearing. Although there was no contention that defendant was in any way involved in the crime of rape, the State's Attorney in closing argument made several references to the threat posed by the crime of rape. First, in arguing the harm caused by defendant's acts of violence the State's Attorney alluded to the amount of liberty lost by society in general as a consequence of criminal activity and then mentioned the inability of a man to go to work in the morning in East St. Louis without being gunned down, and the inability of a woman to deliver mail in broad daylight in East St. Louis without being afraid that she is going to be raped and shot, obviously alluding to the victims of the April 30 shootings. At this point the court sustained an objection made by defense counsel and instructed the jury to disregard any reference to rape. Next, in arguing the need for severe penalties for those who commit violent crimes, the State's Attorney twice mentioned the crime of rape. The initial reference to rape was clearly objectionable, but the court's ruling on the objection and the court's instruction to disregard any reference to rape substantially corrected this error. (See *People v. Lion* (1957), 10 Ill. 2d 208, 216.) The later two references to rape were not directed at defendant, and no objection was made to these references during argument. In view of the earlier instruction to disregard all references to

rape we are of the opinion that the jury was not misled thereby. We are not persuaded that defendant, by these comments, was deprived of a fair hearing. See *People v. Smothers* (1973), 55 Ill. 2d 172, 176.

At another point in closing argument the State's Attorney, apparently in an attempt to discredit defense counsel's argument in favor of a natural life sentence, presented the following rhetorical question to the jury, "How about the guards in that institution, and the inmates in that institution, are you so sure that you can preserve him from committing crime again by doing anything other than what he deserves, the death penalty?" We cannot say that this question regarding the safety of the hypothetical guard and inmates, not objected to at sentencing, was improper under these circumstances. After examining the State's Attorney's closing argument we find no reason to conclude that any comment made was so inflammatory as to deny defendant his right to a fair hearing.

We find no reversible error, and the sentences imposed for the murders of Samuel Nersesian and Debra Brown are affirmed. The sentence imposed for the murder of Richard Stoltz must, however, be vacated and the cause remanded to the circuit court of St. Clair County for the imposition of a sentence other than death. In *Enmund v. Florida* (1982), ____ U.S. ____, 73 L. Ed. 2d 1140, 102 S. Ct. 3368, the Supreme Court held that the defendant could not be put to death for two killings that he did not commit and had no intention of committing or causing. With respect to the death of Richard Stoltz there is nothing in the record that shows that defendant killed, attempted to kill, or intended to kill the victim, and the decision in *Enmund* requires that the death sentence be vacated. The cause as to the Stoltz murder is therefore severed and remanded to the circuit court of St. Clair County for the imposition of a sentence other than death.

As to the judgment pertaining to the other two murders, the clerk of this court is directed to enter an order fixing Wednesday, May 18, 1983, as the date on which the sentence of death entered in the circuit court shall be executed at the Illinois State Penitentiary at Joliet. A certified copy of this order shall be furnished by the clerk of this court to the Director of Corrections and the wardens of the Illinois State Penitentiary at Menard and Joliet.

Affirmed in part and vacated in part and remanded in part, with directions.

JUSTICE SIMON, dissenting:

I do not agree that the defendant was given a fair sentencing hearing by a jury free from undue influence by the trial judge. A transcript of the proceedings in which Jones entered his guilty plea was read to the sentencing jury as a part of the evidence. The jury heard that the trial judge told Jones when the guilty plea was received "if certain factors are present, you could be sentenced to death ***. Did he [defendant's attorney] tell you that if the factors which are necessary and which are present and which I will read to you are present, I wouldn't hesitate to sentence you to death." Also read to the jury was the trial judge's later statement, "I have to take into consideration our society, which has been neglected for too long by crimes of violence. And from what the facts appear to be here, these are senseless killings."

What the trial judge meant by these statements is not clear. When he spoke of the factors "which are present" was it simply a slip of the tongue? Did he mean to say that if certain necessary factors which he would read to the defendant were present, he would sentence the defendant to death, or was he actually expressing his opinion that the factors were present? When he said he would not hesitate to sentence the defendant to death did he intend to indicate that he believed such a sentence was appropriate in this case or was he merely expressing his willingness to follow the law which he believed gave him no discretion? When he said the killings were senseless did he mean they were more deserving of the death penalty than other triple murders, or that all murders were senseless in his eyes?

The risk that the jurors interpreted the trial judge's words to mean that he thought the death sentence was appropriate for Jones is too great. I believe that, in spite of the cautionary instruction given by the judge at the close of trial telling the jurors that nothing he said should be construed as expressing his opinion, some of the jurors may well have interpreted his comments as partisan.

The majority agrees that an expression of opinion by a judge must not be allowed to influence a jury. (See *People v. Finn* (1959), 17 Ill. 2d 614, 617; *People v. Coli* (1954), 2 Ill. 2d 186, 189; *Murzen v. People* (1898), 173 Ill. 43, 57-59.) A judge at a jury trial is not merely a moderator. The jury looks to him for guidance and wisdom. They depend

upon his knowledge of the law and experience. As such, they are apt to be impressed by his every word. (*Bollenbach v. United States* (1946), 326 U.S. 607, 90 L. Ed. 350, 66 S. Ct. 402.) In this case the manner in which the jurors might have construed the trial judge's remarks cast him in the role of an additional prosecutor. (See *Wong Yang Sung v. McGrath* (1950), 339 U. S. 33, 94 L. Ed. 616, 70 S. Ct. 445, *modified on other grounds* (1950), 339 U.S. 908, 94 L. Ed. 1336, 70 S. Ct. 564; *Ruiz v. Dalgado* (1st Cir. 1966), 359 F.2d 718.) I believe it was a serious error to allow the jury to hear the judge's remarks quoted above.

I also believe, even from the cold record, that the jury could have gained the impression that the trial judge was impatient with the defendant and therefore become prejudiced against the defendants themselves for delaying the disposition of the case. I refer here to the trial judge's remarks, set forth in the majority opinion, when a juror asked the judge why he did not know if the defendant was 18 and also the court's direction to "get instructions for this stage of the game." Both of these comments are set forth in the court's opinion. Both remarks could have left the jury with the impression that the defendant was taking positions that ccaused the State to introduce matters over which there should have been no controversy and thus might have resulted in the jury being biased against the defendant.

I am also concerned about this court's failure to deal adequately with the defendant's argument that some members of the jury might have understood the judge to say that the burden of proof is on the defendant to prove that mitigating factors exist. The judge advised prospective jurors, "you go out and determine whether or not this evidence has taken away the factors, mitigated the factors so that you might say no, we don't want to vote for the death penalty." The defendant contends the jurors may have interpreted this to mean that the burden was on him. The majority points out that at other stages in the proceeding, it was made clear that a unanimous verdict must be reached before a death penalty can be imposed, and thus no harm occurred. The issue here, however, is not how many persons must agree, but what they agree to. Must the jury unanimously agree that beyond a reasonable doubt no sufficient mitigating factor exists, or that more likely than not no sufficient mitigating factor exists or that the defendant has failed to show that such mitigating factors

exist? Th[illegible]ry does not know and neither do I. U[illegible]nimity, however, has nothing to do with the question.

For the above reasons I would vacate the defendant's sentence of death and remand for a new sentencing hearing.

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No. 82 6913

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ANDRE' JONES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

George R. Ripplinger, Jr.
2215 West Main Street
Belleville, Illinois 62221
1-618-234-2440

Counsel for Petitioner

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

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-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Andre' Jones, respectfully requests this Court, in accord with his attached affidavit, for leave to file Petition for a Writ of Certiorari to the Supreme Court of Illinois, without prepayment of costs and to proced in forma pauperis pursuant to Rule 46.

George R. Ripplinger, Jr.
Ripplinger, Dixon & Hoffman
2215 West Main Street
Belleville, Illinois 62221
1-618-234-2440

Attorney for Petitioner

No. _____

IN THE

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October Term, 1982

ANDRE' JONES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, David C. Hoffman, state on oath:

1. That I was appointed to represent Petitioner before the Supreme Court of Illinois.

2. That I was in the above position from late 1980 and personally know that he has been a resident of Menard Penitentiary having no outside source of income.

3. Being familiar with the Court Record, I am aware that he had court appointed counsel at the trial stage of these proceedings as an indigent.

4. The same record, of which I have personal knowledge, shows that he was not employed at the time of his arrest in this cause.

5. That the information contained in the attached affidavit unsigned by him was obtained by telephone from Petitioner.

David C. Hoffman

Subscribed and sworn to before me this 7th day of June 1983.

Portia V. Batson
Notary Public

Ripplinger, Dixon & Hoffman
Attorneys for Petitioner
2215 West Main Street
Belleville, Illinois 62221
1-618-234-2440

IN FORMA PAUPERIS AFFIDAVIT

Andre' Jones

(Petitioner)

v.

People of the State of Illinois

(Respondent(s))

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, Andre' Jones, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes No

(a) If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

(b) If the answer is "no," state the date of past employment and the amount of the salary and wages per month which you received.

None

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes No

b. Rent payments, interest or dividends?

Yes No

c. Pensions, annuities or life insurance payments?

Yes No

d. Gifts or inheritances?

Yes No

e. Any other sources?

Yes No

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in a checking or savings account?

Yes No (Include any funds in prison accounts.)

If the answer is "yes," state the total value of the items owned. _____

_____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes No

If the answer is "yes," describe the property and state its approximate value. _____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

_____

_____

_____

_____

_____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

_____

(Petitioner's signature)

State of _____

County (City) of _____

_____, being first duly sworn

(Name of Petitioner) under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

_____

Signature of Petitioner
(Required as to each petitioner)

Subscribed and sworn to before me

on this ___ day of _____, 198 .

_____

Notary Public or other person authorized to administer an oath.

RECEIVED
JUN 22 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-6913

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ANDRE' JONES, Petitioner

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PROOF OF SERVICE

OF FILING PETITIONER'S AFFIDAVIT IN SUPPORT OF HIS REQUEST TO PROCEED IN FORMA PAUPERIS

I, George R. Ripplinger, Jr., one of the attorneys for Petitioner, being first duly sworn upon my oath, depose and state that on this date I mailed copies of Petitioner's Affidavit in Support of His Request to Proceed in Forma Pauperis, to the following named persons, by placing the same in envelopes with postage fully prepaid and depositing them in the U.S. Mail in Belleville, Illinois, this 17 day of June, 1983.

Neil Hartigan
Attorney General of Illinois
188 West Randolph, Suite 220
Chicago, Illinois 60601

John Barcievic
State's Attorney
St. Clair County
#10 Public Square
Belleville, Illinois 62220

Andre' Jones
Lock Box 711
Menard

George R. Ripplinger, Jr.
Attorney for Petitioner

Subscribed and sworn to before me this 17 day of June 1983.

Notary Public

No. 82-6913

IN FORMA PAUPERIS AFFIDAVIT

Andre' Jones

(Petitioner)

v.

People of the State of Illinois

(Respondent(s))

AFFIDAVIT IN SUPPORT OF REQUEST TO PROCEED IN FORMA PAUPERIS

I, Andre' Jones, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes No

(a) If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

(b) If the answer is "no," state the date of past employment and the amount of the salary and wages per month which you received.

None

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes No

b. Rent payments, interest or dividends?

Yes No

c. Pensions, annuities or life insurance payments?

Yes No

d. Gifts or inheritances?

Yes No

e. Any other sources?

Yes No

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own cash, or do you have money in a checking or savings account?

Yes No (Include any funds in prison accounts.)

If the answer is "yes," state the total value of the items owned. _____

_____

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes No

If the answer is "yes," describe the property and state its approximate value. _____

_____

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. NONE

_____

_____

_____

_____

_____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

André V. Jones

(Petitioner's signature)

State of Illinois

County ~~(City)~~ of Randolph

André V. Jones, being first duly sworn

(Name of Petitioner) under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

André V. Jones

Signature of Petitioner
(Required as to each petitioner)

Subscribed and sworn to before me

on this 12th day of June, 1983.

Charles R. Mattingly

Notary Public or other person authorized to administer an oath.

My Commission Expires October 1, 1985

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-6913

ANDRE JONES,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

I. Whether The Illinois Death Penalty Statute Provides The Sentencing Authority With Constitutionally Sound Guidelines In Deciding Whether To Impose The Death Penalty.

II. Whether It is Unconstitutional For A Convicted Murderer To Be Sentenced To Death Based In Part On Factors Not Specifically Spelled Out In A State's Death Penalty Law.

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 94 Ill.2d 275 (1982).

A copy of the opinion is appended to petitioner's petition as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as discussed more fully below, respondent submits that the petitioner has not shown

any reason for this Court to exercise its discretion to grant his petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS

Petitioner relies on the Sixth and Eighth Amendments to the Constitution of the United States, made applicable to the states pursuant to the Fourteenth Amendment.

STATEMENT OF THE CASE

THE VICTIMS

RICHARD STOLTZ

On the morning of April 30, 1979, petitioner and his girlfriend, Laurie Elem, left his house to go for a walk. Before leaving, however, he took his .22 caliber six-shot revolver and put it in his coat pocket. They walked to the Roosevelt Homes in East St. Louis, Illinois, where the petitioner's mother lived. He visited his mother while Laurie visited with a girlfriend. (R. 281). 1/

Later, the petitioner left and picked up Laurie. When he met Laurie she was in the company of her cousin, Freddie Tiller. 2/ The trio then walked from the Roosevelt Homes to a brickyard in the vicinity of 33rd and State Streets, where Freddie observed an old white man stacking bricks on the back of a pickup truck. This old white man was Richard Stoltz. (R. 281-282; C. 72).

Freddie asked the petitioner for his gun and stated that he was going to rob Mr. Stoltz. Laurie continued walking.

1/ For purposes of citation, references to the volume containing the common law record are designated "C. ___;" references to the volumes containing the verbatim transcript of the sentencing proceedings are designated "R. __."

2/ Freddie Tiller was indicted with the petitioner, but was tried separately.

The petitioner gave his gun to Freddie, who then announced the stickup to Mr. Stoltz. When Mr. Stoltz raised his hands into the air Freddie fired the gun, striking Mr. Stoltz in the left eye. Mr. Stoltz fell from the truck-dead. (R. 282, 285-287; C. 72).

While he lay there, Freddie robbed him of his wallet, keys and wristwatch. The petitioner and Freddie rejoined Laurie and continued their walk. (R. 282; C. 72).

SAMUEL NERSESIAN

The trio walked until they arrived at the Illinois Avenue Cleaners, where the petitioner told Laurie to go home. The petitioner then suggested that he and Freddie rob the cleaning store. Freddie agreed. After placing a ski mask over his head, the petitioner and Freddie entered the store. Once inside, the petitioner shot the proprietor in the head, as he was approaching them. The proprietor fell to the floor where the petitioner again shot him in the head. Samuel Nersesian was dead. (R. 282-283, 296-303; C. 73).

DEBRA BROWN

After shooting Samuel Nersesian, the petitioner opened the cash register and took an untold amount of money. As they were about to leave, a mail carrier arrived in a mail truck and entered the store. The petitioner, who was hiding

behind the door, grabbed her from behind and pushed her into a storage room at the rear of the store. There, he knocked her to the floor and shot her once in the chest. He then shot her again - in the mouth. Debra Brown was dead. (R. 283, 288-291; C. 73).

The petitioner and Freddie then left the store; the defendant walked across the street to his house and Freddie left in the mail truck. (R. 283-284; C. 73).

After conducting an investigation, the police arrested the petitioner on May 4, 1979. On that date, after being fully advised of his constitutional rights and waiving them, the petitioner confessed fully to the three killings. (R. 275-284).

Subsequently, the petitioner was indicted for murder, armed robbery and armed violence. (C. 19-23).

On August 23, 1979 he pleaded guilty to the three murder charges. (C. 58-83).

MICHAEL AND DORA WALLACE

On August 30, 1979, after the defendant pleaded guilty to the murders of Richard Stoltz, Samuel Nersesian and Debra Brown, Robert Miller, a detective from the St. Clair County, Illinois Sheriff's Office, interviewed Freddie Tiller

at the jail. The purpose of this interview was to determine whether Freddie Tiller had any knowledge of other unsolved crimes in the St. Clair County area. Freddie Tiller told Detective Miller that the petitioner might have been involved in some of those crimes. (C. 373-374).

Detective Miller then interviewed the petitioner. After being fully advised of his constitutional rights the petitioner waived them. (C. 374). The petitioner then expressed knowledge of other homicides in St. Clair County. While he did not provide any specific information regarding these homicides, he did tell Detective Miller that he made up his mind in prison that in the future he would "destroy" any victims or eyewitnesses to his crimes. He stated that his previous convictions resulted directly from victims or eyewitnesses who identified him and that he would never allow this to happen again. (R. 374-375).

Two days later, however, the petitioner requested to see Detective Miller. When Detective Miller met the petitioner he was given a six page handwritten confession. This confession described in detail how the petitioner had murdered Michael and Dora Wallace. Those murders had taken place on November 15, 1978, six and one-half weeks after the petitioner was released from prison and less than six months before the date of the April 30, 1979 murders of Richard Stoltz, Samuel Nersesian and Debra Brown. (R. 366, 375-377, 412-416).

In his confession, the petitioner related how on November 15, 1978 he had had an argument with his grandmother which upset him. To restrain himself from hurting his grandmother, he left the house. He stated that he had to find someone to impose his anger upon. He started to walk to his mother's house when he walked up to a white wooden house and knocked on the door. An old white man dressed only in his underwear answered the door. When the man failed to recognize the petitioner he attempted to shut the door, but the petitioner prevented this by placing his foot in the door.

The petitioner forced his way into the house and knocked the old man down. He told the man and his wife not to move or else he would shoot them. After robbing them of a handgun and some money, which he found under a mattress, he went to the kitchen where he got a butcher knife and some other knives. He returned to the room where his victims waited and told the old man that he was going to cut off his head. The old man was staring at the petitioner when he, the petitioner, stuck the butcher knife into the old man's neck and began to cut around his throat. Seeing this, the wife ran into the kitchen where she fainted, after running into a table. The petitioner pursued her and, as she lay on the floor, started to decapitate her. Before finishing, however, he returned to the old man's body and finished decapitating him. Michael and Dora Wallace were dead.

The petitioner then went to the basement where he smoked a cigarette, loosened a gas pipe and set the house afire. Finally, he left the house with the proceeds of the robbery, the butcher knife used to kill the Wallaces and Mr. Wallace's head. He later threw the head away and went to his mother's house. (R. 412-416).

Detective Miller, who had no prior knowledge of the Wallace killings, did not then question the petitioner about his confession. Rather, he contacted Richard Stone, a detective from the East St. Louis Police Department, and advised him of its contents. Detective Stone was asked to assist in corroborating the confession because he had initially investigated the Wallace murders. Detective Stone was unable to assist Detective Miller because he was involved in other investigations. However, he did provide Detective Miller with the details to the Wallace crime scene. (R. 377).

After obtaining this information from Detective Stone regarding the Wallace killings Detective Miller interviewed the petitioner to further corroborate his confession. As a result of this interview, Detective Miller's information that there was a small brown dog in the Wallace residence and that the handgun that was taken was a .32 caliber revolver was corroborated. (R. 378, 396-397, 398).

In addition, the petitioner also arranged to have an unidentified female deliver the butcher knife used in the

killings to Detective Miller. (R. 378-379). The knife was subsequently identified by the victims' son as one of his father's butcher knives. (R. 398-399). Finally, the testimony of witnesses present at the crime scene fully corroborated the petitioner's confession. (R. 382-391, 392-397).

Lastly, Mr. Wallace's skull which the petitioner had taken with him after setting the house afire, was found approximately one week later and positively identified by a tooth and jawbone fragment found at the scene. (R. 389).

THE SENTENCING HEARING

As stated, on June 8, 1979, petitioner was indicted by the St. Clair County, Illinois Grand Jury for the April 30, 1979 murders of Richard Stoltz, Samuel Nersesian and Debra Brown. In addition, he was indicted for three counts of armed robbery and three counts of armed violence involving these murder victims. (C. 19-23).

On August 23, 1979, the petitioner pleaded guilty to the three murder charges. (C. 58-83). The State's Attorney requested a separate sentencing hearing for the purpose of imposing the death penalty. The petitioner elected to have a jury sentence him.

On April 14, 1980, a jury was empanelled to sentence the petitioner. On April 15, 1980, after reading the

transcript of his guilty plea, the jury returned a verdict and unanimously found that the petitioner had attained the age of 18 or more at the time that he committed the offense of murder. (R. 338). Further, they unanimously found, beyond a reasonable doubt, that the petitioner had been convicted of murdering two or more individuals. (R. 338); Ill. Rev. Stat. 1980, ch. 38, §9-1(b)(3). The cause then proceeded to the aggravation and mitigation phase. (R. 339); Ill. Rev. Stat. 1980, ch. 38, §9-1(c),(d),(g).

In aggravation, the State's Attorney presented evidence that the petitioner had a significant history of criminal activity. Ill. Rev. Stat. 1980, ch. 38, §9-1(c)(e). This evidence included his juvenile history as well as his adult history. This history showed petitioner's involvement in thefts, burglaries, armed robberies, attempt murder, probation and parole violations, and disciplinary violations while he was incarcerated. (R. 353-368). Additionally, a psychiatric evaluation of the petitioner, prepared before he was released on parole in October, 1978, found that he "has aggressive tendencies, low frustration tolerance, high impulsivity, very poor delaying mechanism, and a total inability to channel his aggression into constructive aspects of life." (R. 367). The evaluation concluded that "[t]his is a street wise, institution wise individual with considerable sociopathic tendencies in him." (R. 367).

Finally, the State's Attorney presented evidence of the Wallace killings and read the petitioner's confession to the jury. (R. 373-400, 412-416).

The petitioner presented no evidence in mitigation. (R. 416).

After being instructed by the judge, the jury retired to deliberate their verdict. They returned a verdict finding that there was no sufficiently mitigating factors present to preclude imposition of the death sentence upon the petitioner. (R. 443).

The judge, pursuant to the verdict and statute, sentenced the petitioner to death for the murders of Richard Stoltz, Samuel Nersesian and Debra Brown. (R. 444-446); Ill. Rev. Stat. 1980, ch. 38, §9-1(g).

The sentences were stayed pending direct review by the Illinois Supreme Court. (R. 444-446); Ill. Rev. Stat. 1980, ch. 38, §9-1(i).

On December 17, 1982, and after a careful review, the Illinois Supreme Court found no reversible error and affirmed the sentences of death imposed for the murders of Samuel Nersesian and Debra Brown.

However, the sentence of death imposed for the murder of Richard Stoltz was vacated and that cause remanded

for the imposition of a sentence other than death. This action was taken pursuant to this Court's holding in Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368 (1982).

This petition for a writ of certiorari followed the Illinois Supreme Court's denial of petitioner's petition for rehearing.

REASONS FOR DENYING THE WRIT

I. THE ILLINOIS DEATH PENALTY STATUTE PROVIDES THE SENTENCING AUTHORITY WITH CONSTITUTIONALLY SOUND GUIDELINES IN DECIDING WHETHER TO IMPOSE THE DEATH SENTENCE.

The petitioner claims that the Illinois statute providing for the imposition of the death penalty in certain cases of murder does not contain sufficient guidelines to enable a jury to properly determine when the death penalty may be imposed. In arguing this contention, the petitioner urges that if the sentencing authority literally followed the section of the statute that requires it to impose the death penalty if it unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence, then it would necessarily be required to impose the death penalty unless the defendant presented a complete defense to the aggravating factors. He concludes that this standard, while seeking to avoid capricious and arbitrary sentencing, actually fosters such sentencing. The respondent submits that the statutory provisions requiring the examination of specific factors that argue in favor of or against the imposition of the death penalty suitably direct and limit the discretion of the sentencing authority so as to minimize the risk of wholly arbitrary and capricious action.

The Illinois Death Penalty Act establishes a bifurcated procedure to be followed in cases where the State's

Attorney requests imposition of capital punishment on a defendant convicted of murder. Ill. Rev. Stat., 1980, ch. 38, §9-1, et seq. This two-step procedure, endorsed by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), requires that the trier of fact first decide the issue of guilt or innocence. After a defendant is convicted of murder and the State requests a death penalty hearing, the sentencing procedure requires the State to prove the existence of any of the enumerated aggravating factors, by competent evidence and beyond a reasonable doubt. Ill. Rev. Stat., 1980, ch. 38, §9-1(b),(e),(f). If the State succeeds in proving the existence of any of the aggravating factors, the sentencing authority must then consider any aggravating and any mitigating factors relevant to the determination of whether to impose the death penalty. Ill. Rev. Stat., 1980, ch. 38, §9-1(c). Once presented, in order to impose the death penalty, the sentencing authority must unanimously find that no mitigating factors are sufficient to preclude the imposition of the death penalty. Ill. Rev. Stat., 1980, ch. 38, §9-1(g),(h). If capital punishment is ordered the defendant receives an automatic appeal to the Supreme Court of Illinois.

Sections 9-1(b) and (f) clearly establish specific guidelines for the sentencing authority to follow in deciding whether the defendant is properly qualified for

the death penalty. The State is required to establish, beyond a reasonable doubt, that the defendant committed an act which brings his or her conduct within at least one of the seven enumerated aggravating factors. The sentencing authority thus may not even consider imposing capital punishment under section 9-1 unless and until the State meets its traditional burden of proof. By precisely limiting the types of criminal conduct which may be subject to capital punishment, and by forbidding capital punishment unless such conduct is established beyond a reasonable doubt, section 9-1 fulfills the constitutional requirement that the sentencing authority have specific standards to follow in determining that class of cases in which the death penalty will be available. Gregg v. Georgia, 428 U.S. 153, 189, 197, 96 S.Ct. 2909 (1976); Zant v. Stephens, 33 Cr. L. 3195 (June 22, 1983).

The petitioner contests the constitutionality of the second stage of the proceedings. Specifically, he challenges the manner in which mitigating and aggravating factors are weighed in the actual death penalty hearing. If the sentencing authority unanimously finds the existence of at least one statutorily recognized aggravating factor, the defendant is then a candidate for the death penalty. Then, and only then, does the sentencing proceeding progress to the aggravation and mitigation stage. The Act states that

the sentencing authority shall consider any mitigating factors which are relevant to the imposition of the death penalty. It sets forth certain specific factors, including circumstances ot the defendant and of the crime, and prescribes that the mitigating factors to be considered "may include but need not be limited to" those thus delineated. Ill. Rev. Stat., 1980, ch. 38, §9-1(c). It further provides that any information relevant to the mitigating factors may be presented regardless of its normal admissibility under the rules of evidence, and that the defendant may rebut the evidence presented by the State. Ill. Rev. Stat., 1980, ch. 38, §9-1(e). A procedure by which a defendant could more completely enlighten the sentencing authority concerning his "individual circumstances" and "individual characteristics" is difficult to imagine.

As recognized by the Illinois Supreme Court, the preclusion of the death penalty does not require a complete defense to the aggravating factors. Petitioner's EXHIBIT A at 4. The Illinois Supreme Court recognized that a balancing process was required. This Court's opinion in Jarek v. Texas, 428 U.S. 262 (1976) makes clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. More recently, in commenting on the balancing process, this Court stated:

> This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths. Adams v. Texas, 418 U.S. 38, 47 (1980).

Just last month this Court emphasized that "[w]hat is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 33 Cr.L. 3195, 3200 (June 22, 1983) (emphasis in original).

In the present case, all of the evidence presented at the second stage was offered by the prosecution in aggravation. The record reveals that petitioner was afforded a full and fair opportunity to present to the sentencing jury any information he deemed potentially helpful to his cause. He declined all offers, including his right of allocution. R. 416. The jury instructions outlined the law on the weighing process to be conducted between aggravating and mitigating factors. R. 438-440. The jury's verdict directing the judge to impose the death sentence on the petitioner indicated the absence of mitigating factors sufficient to preclude the sentence of death. R. 443.

The petitioner's failure to provide any mitigating input into the weighing process largely accounts for the verdict that was reached. This failure, coupled with the overwhelming evidence in aggravation, makes a contrary verdict

difficult to perceive. The petitioner's failure to present any evidence in mitigation left the jury little, if anything, to balance. Under the circumstances of this case, it cannot be said that the verdict was arbitrary or capricious.

Petitioner also argues that section 9-1(e) of the Illinois Death Penalty Act, which allows evidence to be admitted regardless of its admissibility under the rules of evidence governing criminal trials, sets no standard for guidance for the sentencing authority or the attorneys. Respondent submits that the Act provides sufficient guidance under the previous decisions of this Court.

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the Georgia statutory scheme providing the imposition of the death penalty under certain circumstances did not offend the Eighth and Fourteenth Amendments to the United States Constitution. In reaching its decision, the Court discussed the advantage of a bifurcated proceeding where the question of sentence is not considered until after the determination of guilt has been made.

One of the advantages the Court noted was that:

> [m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. 428 U.S. at 191.

Then, citing its earlier decision in United States v. Bruton, 391 U.S. 340 (1968), which had held inadmissible against a defendant at trial on the criminal charge a co-defendant's confession, the Court noted that in other situations it had concluded that a jury cannot be expected to consider certain evidence before it on one issue, but not on another. id., nt. 40. The court then concluded that concerns that the death penalty not be imposed in an arbitrary and capricious manner can best be met by a system that provides for a bifurcated proceeding,

> at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. 428 U.S. at 196.

The same day that it decided Gregg, the Court announced its opinion in Woodson v. North Carolina, 428 U.S. 280 (1976). In Woodson, the Court held that the fundamental respect for humanity underlying the Eighth Amendment requires:

> consideration of the character and the record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death. 428 U.S. at 305.

Two years later, in Lockett v. Ohio, 438 U.S. 586 (1978), in invalidating the Ohio death penalty statute the Court stated that "we cannot avoid the conclusion that an individualized decision is essential in capital cases. 438 U.S. at 606. Noting that in Woodson it had not attempted

to indicate what facets of an offender or his offense were relevant in "capital sentencing", the Court held that the:

> sentencer in all but the rarest kind of capital case, not be precluded from consideration, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. 438 U.S. at 605.

In accord with the dictates of Gregg, Woodson, and Lockett, the Illinois Death Penalty Act provides for the presentation in aggravation and mitigation of any evidence that relates to defendant's character, prior record and the circumstances of his offense. The statute does not discriminate between the parties; it affords both the State and the defendant equal opportunities to present and rebut such information as is relevant to fully inform the sentencing jury about the offense and the defendant. By allowing the sentencing authority to consider any relevant evidence, the respondent has protected the petitioner and similarly situated defendants from the arbitrary and capricious imposition of the death sentence. Lockett v. Ohio, 438 U.S. at 607; Gregg, 428 U.S. at 196-97. The foundation of this statutory provision is constitutionally sound and petitioner's argument must be rejected outright.

In light of the foregoing, the respondent submits that the Illinois Supreme Court was correct in holding that the Illinois Death Penalty Act provides the sentencing authority with constitutionally sound guidelines in deciding whether to impose the death sentence, and respectfully requests that this Court deny petitioner's petition as to this claim.

II. BARCLAY v. FLORIDA, 463 U.S. ___ (1983) PERMITS FACTORS NOT SPECIFICALLY SPELLED OUT IN A STATE'S DEATH PENALTY LAW TO BE CONSIDERED AS REASONS FOR IMPOSING THE DEATH SENTENCE.

Petitioner urges this Court to grant certiorari to resolve the question pending before this Court in Barclay v. Florida, 81-6908, of whether the Eighth Amendment bar on unguided discretion in capital cases is violated by a sentencing scheme that allows statutorily undefined aggravating factors to be considered as reasons for imposing death. Subsequent to the filing of the petition for writ of certiorari, this Court rendered its decision in Barclay. The Court ruled in the case of a Florida man, sentenced to die for trying to start a race war through random murder, that it is not necessarily unconstitutional for a convicted murderer to be sentenced to death based in part on factors not specifically spelled out in a State's death penalty

law. Barclay v. Florida, 463 U.S. ___ (July 6, 1983). In light of this decision, the respondent submits that the petitioner's second issue fails to present a viable reason for review by this Court and urges the denial of the petition with respect to this issue.

CONCLUSION

For the foregoing reasons, the respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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